BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FRED K. QUATTLEBAUM	)	
Claimant	)	
VS.	)	
	)	Docket No. 250,813
MCCORMICK-ARMSTRONG CO., INC.	)	
Respondent	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY COMPANY	)	
and ATLANTIC MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier Hartford Accident & Indemnity Company (Hartford) appealed the October 19, 2001 Award of Administrative Law Judge John D. Clark. The Appeals Board (Board) held oral argument on April 2, 2002.

APPEARANCES

Claimant appeared by his attorney, Tom E. Hammond of Wichita, Kansas. Respondent and its insurance carrier Hartford Accident & Indemnity Company (Hartford) appeared by their attorney, Gary K. Albin of Wichita, Kansas. Respondent and its insurance carrier Atlantic Mutual Insurance Company (Atlantic) appeared by their attorney, Denise E. Tomasic of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations of the Administrative Law Judge.

ISSUES

Hartford contends the Administrative Law Judge erred in finding claimant's date of accident to be October 27, 1998. Hartford argues that claimant has suffered a series of accidental injuries ending January 12, 2000. The parties have stipulated that respondent was provided workers' compensation coverage by Hartford for the period January 1, 1998

through December 31, 1998. Thereafter, beginning on January 1, 1999, respondent's workers' compensation insurance coverage was provided by Atlantic. Therefore, the determination of claimant's date of accident will also determine which insurance company is liable for claimant's injuries suffered while in respondent's employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail, and it is not necessary to repeat those herein. The Board adopts the findings and conclusions contained in the Award as its own.

At the time of regular hearing, claimant had been a first pressman on a six-color Heidelberg sheet-fed press and had been working for respondent for over 25 years. In October 1998, while coming out of the six unit press, claimant slipped off of a small step, fell about two feet and landed on his right foot. As a result of this accident, claimant hyperextended his right knee. Claimant experienced immediate pain in the knee, which he reported to his supervisors, and was referred for care to board certified orthopedic surgeon John D. Osland, M.D.

Claimant was first examined by Dr. Osland on December 9, 1998. Dr. Osland also had the opportunity to review MRI films of claimant's knees, diagnosing medial and lateral meniscus tears in the right knee with degenerative changes in the knee. Dr. Osland recommended a knee arthroscopy with meniscectomies and other treatment as needed. The arthroscopy was performed on January 4, 1999, and consisted of a partial lateral meniscectomy, partial medial meniscectomy and chondroplasty of the medial femoral condyle and lateral femoral condyle.

Claimant was off work for a period and then was returned with restrictions. Post-surgery, claimant also underwent cortisone and Synvisc injections. Dr. Osland described those procedures as temporary treatments for a patient having degenerative changes in his knee. He acknowledged the injections may provide relief for years, but sometimes only provided relief for a short period of time. On April 20, 1999, he discussed with claimant the possibility of a total knee replacement in the future.

Claimant returned to work, performing his regular duties with limitations. Claimant described two incidents, one in October 1999, when he slipped in a bathroom at work, and another on January 11 or 12, 2000, when he tripped on a mat at work which increased his pain. Claimant described the October 1999 slip in the bathroom as an incident which increased his pain for a few days, but eventually the pain returned to the level he had been having prior to the slip. With regard to the incident in January of 2000, claimant stated that his pain got worse, although, in his words, "it wasn't a lot worse, it just never got any

better." Claimant continued with the same level of pain until he underwent a total knee replacement with Dr. Osland.

On December 8, 1999, after claimant had gone through a series of Synvisc and cortisone injections, Dr. Osland and claimant conferred regarding the possibility of surgery. Dr. Osland opined, at that point, that they had come to the end of conservative treatment. Claimant and Dr. Osland agreed to go forward with the total knee replacement.

Dr. Osland testified that at no time prior to the total knee replacement did claimant reach maximum medical improvement. He opined that eventually claimant's knee was going to wear down and be no longer useful.

Dr. Osland testified that the October 1998 accident is what caused claimant to have a total knee replacement. He also confirmed that he would not attribute any portion of claimant's permanent impairment to the other accidents or injuries claimant suffered other than the October 1998 accident. He stated claimant had an injury which caused him to require a total knee replacement from the October 1998 incident. It did not matter to Dr. Osland if claimant had more intervening injuries in between.

Claimant was referred to Roger W. Hood, M.D., a board certified orthopedic surgeon in Overland Park, Kansas, at respondent's (Hartford) request. Dr. Hood opined that the cause of claimant's condition was primarily the traumatic injury of October 1998. He testified the arthroscope was definitely made necessary by the October 1998 incident and agreed that claimant never reached maximum medical improvement after that surgery. He testified that the October 1999 incident in the bathroom was a temporary aggravation with no permanent worsening of claimant's knee. He also stated that the January 2000 trip at work did not permanently worsen the condition, but again only temporarily aggravated it. He felt it inevitable that, at some point, claimant was going to need a knee replacement. He did acknowledge that claimant's walking on concrete surfaces and occasionally carrying 30 pounds could aggravate the knee. When asked whether the carrying activities or the incident in January 2000 played a role in aggravating claimant's condition, he stated that maybe it could.

Claimant was also referred to Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation. This examination was performed at the request of claimant's attorney. Dr. Murati acknowledged claimant had a degenerative condition in his knee which preexisted the 1998 injury. He felt the 1998 injury made claimant's preexisting degenerative condition symptomatic. He also testified that the work claimant continued to perform after the January 4, 1999 surgery aggravated his condition and accelerated his need for a knee replacement. Dr. Murati, however, was not provided any radiological films to review, therefore rending his opinion somewhat suspect. Also, claimant failed to advise Dr. Murati of the incidents occurring after October 1998. Dr. Murati was not advised of those incidents until he spoke to one of the attorneys involved in the litigation shortly before his deposition was taken. He agreed the arthroscopic procedure left claimant's knee in

such condition that almost any physical activity, whether at home or at work, would cause him to have pain and swelling in the knee.

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to the particular case. Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury. Gillig v. Cities Service Gas Co., 222 Kan. 369, 564 P.2d 548 (1977).

The medical opinions in this case are in conflict. Dr. Osland is adamant that claimant's condition stems from the October 1998 injury and subsequent arthroscopic surgery. Dr. Hood agreed with Dr. Osland's opinion, finding the October 1999 slip in the bathroom and the January 2000 trip on mat at work were, at best, temporary aggravations. Dr. Hood did acknowledge somewhat that claimant's work, carrying 30 pounds on a regular basis, could accelerate the need for surgery. However, he went on to testify that claimant would not have needed the total knee replacement near as early as he had but/for the October 1998 accident.

Dr. Murati attributed claimant's additional symptoms to his later work with respondent after the January 4, 1999 surgery. However, even Dr. Murati agreed that the arthroscopic procedure in January 1999 from the October 1998 injury left claimant's knee in such a condition that almost any physical activity, whether at home or at work, would probably have caused him to have additional symptoms.

The Board finds the opinion of Dr. Osland to be the most credible and finds that the treatment provided to claimant, both after the October 27, 1998 accident and the subsequent employment incidents, all stem from the original October 27, 1998 accident.

When the primary injury under the Kansas Workers Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is the direct and natural result of the primary injury. Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997).

The Board, therefore, finds that the Award of the Administrative Law Judge should be affirmed and the responsibility for claimant's ongoing treatment and the stipulated permanent impairment of 43.5 percent to claimant's right leg should be the responsibility of respondent and its insurance carrier Hartford Accident & Indemnity Company.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated October 19, 2001, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

This is a dispute among insurance carriers that should not be litigated in the Division of Workers Compensation. As held in Kuhn[1], the Award should be entered jointly and severally against both carriers, leaving them to litigate their grievances in a separate proceeding brought for such purpose. In Kuhn, the injured employee injured his back on three separate occasions. Between the second and third injuries, respondent changed insurance carriers. Comparing the injured worker to "the ham in the sandwich", the Kansas Supreme Court noted that a primary purpose of the Workers Compensation Act is to provide compensation to injured employees with minimum delay. Accordingly, the Court held that disputes between insurance carriers concerning their respective liabilities for the payment of compensation should not be litigated in the compensation proceedings. The Supreme Court stated, in part:

> The present action presents a graphic illustration of the hardship which may confront a claimant where insurance carriers are permitted to litigate, during the compensation process, claims and equities existing between themselves. We deduce from the trial court's judgment, that neither

[1] Kuhn v. Grant County, 201 Kan. 163, 439 P.2d 155 (1968).

> Reliance nor Farmers is now paying any compensation. In addition, claimant has been put to the expense of printing a brief and of employing appellate counsel, for whose necessary expenses he will not doubt be liable.
>
> These are adversities which a claimant should not be forced to undergo. While we recognize the right of insurance carriers to be protected in their legal rights and to engage in litigation when disputes over their respective liabilities arise between them, yet their quarrels should not be resolved at the expense of an injured workman.[2]

The majority opinion above states that determining the date of accident determines which insurance carrier should be responsible for the payment of claimant's compensation. That was the same issue presented in Kuhn.

BOARD MEMBER

c: Tom E. Hammond, Attorney for Claimant
Gary K. Albin, Attorney for Respondent (Hartford)
Denise E. Tomasic, Attorney for Respondent (Atlantic)
John D. Clark, Administrative Law Judge
Philip S. Harness, Director

[2] Kuhn, at 171 and 172.